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No. 03-1230

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

There is no denying the central reality of this case: the Michigan tax places significant burdens on interstate commerce. Its structure inevitably discourages interstate businesses from competing in the Michigan hauling market, while pressuring local businesses to confine their activities to the State. The tax therefore exacerbates the very tendencies toward economic Balkanization that it is the central goal of the Commerce Clause to prevent.

Given this reality, it is not surprising that Michigan and its *amici* are utterly unable to mount a coherent defense of the tax, to explain how the effects of the tax could be thought consistent with Commerce Clause principles, or even to articulate an intelligible test for distinguishing valid from invalid state levies. Indeed, it is revealing that, in significant respects, the dizzying stew of arguments advanced by Michigan and its *amici* are inconsistent with one another. Michigan and *amici* National Conference of State Legislatures, *et al.* ("NCSL"), for example, argue that the tax should be upheld as a regulatory fee; the United States disagrees. Meanwhile, *amici* States of Illinois, *et al.* ("Illinois") argue that even companies engaging in interstate transactions should be required to bear multiple state tax burdens; again, the United States takes a different view. As this disarray on respondent's side of the case suggests, there simply is no plausible basis on which the Michigan tax can be upheld.

A. The Michigan Tax Cannot Be Sustained On The Theory That It Falls On "Local" Activities

The centerpiece of the United States' oddly equivocal defense of the Michigan tax[1] is the assertion that, because the

[1] The United States recognizes throughout its brief that levies like the Michigan tax might well have impermissible effects on inter-

taxed activity has a "distinctly local character," the tax should be upheld on the ground that it "presents no heightened danger of * * * economic Balkanization." U.S. Br. 13, 14. Michigan and its other *amici* advance similar arguments. See Resp. Br. 14; Illinois Br. 21. For several reasons, this contention is manifestly wrong.

1. The United States focuses its argument exclusively on the proposition that the Michigan tax does not discourage the movement of goods interstate. But that assertion ignores the most obvious and pernicious effects of the tax: as we explain in our opening brief (at 16-17), the levy necessarily has a protectionist impact that discourages competition across state lines. Out-of-state truckers (or truckers conducting interstate operations) who make intrastate hauls in Michigan pay the tax at a higher effective rate than do truckers who confine their operations to Michigan, and their trucks will be forced to pay cumulative taxes if other states replicate the levy.[2] The

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state commerce. See U.S. Br. 13 ("the situs of the [taxed] activity is not by itself decisive"); 14 ("This is not to say that fees imposed for the right to perform intrastate motor carriage will never affect interstate commerce or implicate the concerns that underlie the Court's Commerce Clause jurisprudence."); 15 n.8 ("Affirmance of the state court's judgment would not preclude future constitutional challenge based on proof of actual and substantial impairment of interstate commerce, to similar (or substantially larger) fees on intrastate carriage[.]"); 19 (petitioners could "plausibly" argue that the Michigan tax has a significant "*practical* impact on an inherently mobile enterprise") (emphasis in original).

[2] As the United States acknowledges, the Commerce Clause precludes states from distinguishing "'between entities that serve a principally interstate clientele and those that primarily serve an intrastate market.'" U.S. Br. 8 n.4 (quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997)).

United States (and, for that matter, Michigan and its other *amici*) do not, and could not, deny that this is so.

As a consequence, the Michigan tax inevitably induces interstate operators to refrain from competing for local business in Michigan. By the same token, if an interstate trucker does pay the tax, the structure of the levy will place "hydraulic pressure" on that carrier to concentrate its activity in Michigan "rather than 'among the several States'" so as to lower its effective tax rate. *Scheiner*, 483 U.S. at 286-287. And for the same reason, the tax "discourage[s] [Michigan] corporations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 (1996). The tax thus protects local markets and places burdens on interstate business activities, directly implicating some of the principal goals of the Commerce Clause. See generally, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576-580 (1997).

So far as Commerce Clause policies are concerned, it is wholly immaterial that the Michigan tax discourages out-of-state (and interstate) operators from competing for *intrastate* business with local firms. This point is both obvious and fundamental. For example, the United States surely agrees that the Commerce Clause would preclude Michigan from imposing a *higher* tax on out-of-state (or interstate) operators for the privilege of making intrastate Michigan hauls than it imposes on truckers who confine their operations to Michigan – even though the taxed activity under such a regime would be just as "distinctively local [in] character" as is the taxed activity here. But as we have shown, and as the United States acknowledged in its filing at the certiorari stage,[3] the Michi-

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[3] See Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 16 (for carriers engaging in both interstate and intrastate carriage, "the cost-per-mile * * * for engaging in intrastate commerce within Michigan would generally be higher

gan tax has just such a discriminatory effect.[4] Indeed, because the structure of such a levy makes discrimination inevitable, there is no reason to differentiate the Michigan tax from one that is facially discriminatory.

2. For related reasons, the United States is incorrect in its argument that *Scheiner* is not controlling here. *First*, the United States observes that payment of the Pennsylvania fees challenged in *Scheiner* was "a *legal prerequisite* to the conduct within the State of *interstate commerce* using the covered motor vehicles," and that the Court's decision "focused on the potential impact of the challenged fees on *interstate* operations." U.S. Br. 22, 23 (emphasis in original). Therefore, the United States concludes, *Scheiner* has no implications for a case where "the fee is assessed for engaging in purely intrastate transactions or services." *Id.* at 23-24.

The United States accurately describes the tax in *Scheiner*, but its legal conclusion is a *non sequitur*. Perhaps because it rarely participates in cases involving the dormant Commerce Clause, the United States appears to be of the view that the Clause is directed only at state laws that burden

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than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce").

[4] The United States equates the Michigan tax to a sales tax, which need not be apportioned even when it falls on goods or services that travel interstate. U.S. Br. 15-16. But this analogy fails because, as the Court has explained, a sales tax is internally consistent. See *Jefferson Lines*, 514 U.S. at 187-188. Such a tax, which is measured by the value of the good or service sold, does *not* apply at a higher effective rate when more of a seller's sales occur outside of the taxing jurisdiction. See *id.* at 198-199. And unlike the Michigan tax, a sales tax does not impose the burden of cumulative flat taxes on businesses that sell in more than one state; the amount of tax paid will vary according to the volume of sales, not the number of states in which the taxpayer does business.

the delivery of goods *between* two or more states. See U.S. Br. 15, 23. But fundamental Commerce Clause policies are far broader than that: as we have just noted, the Clause also invalidates state laws that discourage out-of-state or interstate operators from competing with local businesses for intrastate business, that discourage local businesses from plying their trades in other states, or that pressure interstate operators into concentrating their activities in the taxing state (here, pressuring motor carriers into dedicating their trucks to intrastate Michigan hauls, rather than to interstate operations). See, *e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 576-580. *Scheiner*, which describes the "hydraulic" effects of flat taxes like Michigan's, makes clear that the levy challenged here has just those forbidden consequences.

Second, the United States recognizes the likelihood that, "*within the class of commercial motor vehicles that actually conduct point-to-point hauls within Michigan and are therefore assessed the $100 fee*, the average interstate vehicle will derive less benefit from the fee * * * than does the average truck that operates wholly in Michigan." U.S. Br. 25 (emphasis in original). But because vehicles that do not make point-to-point hauls in Michigan "will escape the fee entirely," the United States reasons that the tax "favors one subset of interstate vehicles (those that use Michigan roads exclusively in interstate commerce) while probably disfavoring another (those that engage in some point-to-point hauls in Michigan)." *Id.* at 26. The United States accordingly finds it unclear whether "interstate carriers *as a whole* pay a greater proportion [of receipts collected under the Michigan tax] than they would under [an] alternative mileage-based regime," or whether the tax "has an adverse *aggregate* impact on interstate vehicles." *Id.* at 25, 26 (emphasis added).

Again, however, this observation, even if accurate, is beside the point. It has never been the law that a state may insulate its local businesses against interstate competition in one

market by providing benefits to interstate firms that operate in a *completely separate* market; the United States does not cite any decision standing for that counterintuitive proposition.[5] A state plainly could not, for example, protect its local wine industry from interstate competition by waiving the tax due on sales of both domestically produced wines and foreign-produced beers, and by claiming that, *in the aggregate*, this system did not disfavor interstate liquor sales *as a class*.[6] Yet that is precisely the rationale advanced by the United States in support of the Michigan regime. The Michigan tax gives Michigan businesses an unfair advantage in competition for intrastate hauls, and that forbidden effect is not cured by unrelated benefits given truckers who are effectively precluded from competing in the local market.

Third, the United States accuses us of seeking a system "in which state boundaries have *no* economic relevance to a motor carrier's choice of routes," an outcome that the United States says could never be achieved because, for example, "some States charge higher per-mile fees than others." U.S. Br. 27-28 (emphasis in original). This contention confirms the United States' misunderstanding of the controlling principle. States are free to vary the *rates* of their *fairly apportioned taxes* (or to eliminate those taxes altogether) because such a system is internally consistent; companies that do the same volume of business in the taxing state are subject to the

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[5] The United States itself quotes the Court as framing the question in *Scheiner* to be whether the challenged taxes "'discriminate against *some* participants in interstate commerce.'" U.S. Br. 23 (quoting *Scheiner*, 483 U.S. at 282) (emphasis added).

[6] The dangers inherent in sustaining discriminatory state taxes on such a theory are obvious: states could provide a free pass to interstate businesses in fields in which in-state firms are not equipped to compete, while providing competitive advantages to local companies in fields in which in-staters are active.

same tax, applied at the same effective rate, no matter how many states those taxpayers traverse and how widely the tax rates in those states vary. But flat taxes like Michigan's have the opposite effect: they are structured to punish companies that do business in more than one state and *inevitably* tax interstate firms at a higher effective rate than the one applying to companies that confine their operations to the taxing jurisdiction. Such taxes do not "maintain state boundaries as a neutral factor in economic decisionmaking." *Scheiner*, 483 U.S. at 283.

3. Because it is wholly divorced from Commerce Clause policies, the United States' test turns on precisely the sort of artificial, metaphysical distinctions that the Court disavowed in *Complete Auto*. As we understand it, the United States' analysis goes as follows. (a) A flat tax that falls on a motor carrier that is (or may be) engaged in an interstate journey is per se invalid under *Scheiner*. See U.S. Br. 23 n.12. (b) A flat tax that falls on a "distinctly local" activity or event is subject to a looser test; such a levy will be invalidated only in the face of "record evidence concerning [its] actual impact on interstate carriage" or when there is "an established likelihood of systemic burdens on interstate commerce." *Id.* at 13, 27. (c) The tax here is "distinctly local" because it falls on an event that has "its locus wholly within Michigan" (*id.* at 16), the tax therefore is subject to the more permissive test, and (in the United States' view) there has been an insufficient showing that the tax places "systemic burdens on interstate commerce." *Id.* at 27.

On the face of it, the United States' rule would resurrect the very approach that prevailed prior to *Complete Auto*, when the validity of state taxes also turned on whether the incident of the tax was said to fall on some "distinctly local" activity. See Pet. Br. 32-33. The United States' test would involve precisely the same semantic hair-splitting, manipulation, and artificial formalism that bedeviled the Court's

Commerce Clause doctrine during that period. Here, for example, it is not at all clear why the Michigan tax should be characterized as wholly local in its effects; after all, when an interstate operator is making the intrastate haul, the equipment used to provide the service in Michigan *has traveled across state lines to do so*. And more broadly, as Justice Rutledge explained for the Court in *Nippert*, a test like the one proposed by the United States invites states to engage in semantic gerrymandering of their laws so that their taxes purport to fall on some separable local incident. Although the United States acknowledges this danger, agreeing with us that "'virtually all interstate activities can be broken down into component parts that take place entirely within one state'" (U.S. Br. 13 (citation omitted)), it offers absolutely no method for determining when taxes on these local activities are subject to the test of *Scheiner* rather than the one that is said to govern levies on "local activities."[7] Tellingly, although we raised this concern in our opening brief, the United States offers no response.

The artificiality of the United States' test, and its close kinship to the rule that prevailed prior to *Complete Auto*, is nicely illustrated by the Solicitor General's invocation of the "peddler" cases. Quoting at length from *Wagner* v. *City of Covington*, 251 U.S. 95 (1919), the United States propounds

[7] To offer just one example of the myriad sort of questions that might arise, imagine a flat state tax on trucks that make "deliveries of waste for disposal at a landfill in the taxing state." Under the Solicitor General's test, is such a tax subject to the rule of *Scheiner* because the waste might have been transported across state lines into the taxing state for delivery to the landfill? Or is it subject to the more forgiving standard the Solicitor General would apply to taxes on "distinctly local activities" because delivery to an in-state landfill "is a distinct and independently significant commercial transaction having its locus wholly within [the taxing state]"? U.S. Br. 16. The United States offers no way to answer this question.

a rule under which a transaction is treated as "local" (and therefore subject to a flat tax) when a peddler carries a product manufactured in State A across state lines into taxing State B, where he or she sells it – but a transaction is treated as "interstate" (and therefore *not* subject to a flat tax) when that same peddler (now called a "drummer") enters that same taxing State B and agrees to sell that same product, but has the product shipped to the purchaser from State A. See *id.* at 101-103; U.S. Br. 20-22. Thus, under the United States' rule, the constitutionality of a tax turns on whether the product is carried into the taxing state by the salesman or mailed into that state from the salesman's place of employment. It hardly seems necessary to observe that this distinction is completely divorced from economic reality, will lead to gamesmanship and manipulation of the worst kind by both states and taxpayers, and has no connection to Commerce Clause policies.[8]

B. This Court's Precedents Cannot Sustain The Michigan Tax

This Court's older decisions cannot be used to salvage the Michigan tax. Arguing to the contrary, the United States invokes *Osborne* v. *Florida*, 164 U.S. 650 (1897), and several similar holdings. As we explained in our opening brief

[8] The United States suggests that congressional action in this area "confirms the distinctly local character of point-to-point hauls within a single State." U.S. Br. 16. This is a surprising assertion. In fact, Congress has *preempted* state laws "related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1)) – even, as the United States acknowledges, "insofar as such regulation pertains to point-to-point hauls *within a single State*." U.S. Br. 17 (emphasis added). While there are some exceptions to this blanket preemption (see *id.* at 17-18), Congress's decision to generally preempt intrastate trucking regulation by the states demonstrates that burdens imposed on intrastate carriage may well impede interstate commerce.

(at 32-37), however, those decisions were premised on the discredited, pre-*Complete Auto* view that taxes on local activities are wholly immune from Commerce Clause challenge. The United States makes no response to this point, and no attempt to defend the analysis of *Osborne*.[9]

Instead, the United States points to dicta from a decision that it failed to cite in its brief at the certiorari stage, *Sprout* v. *City of South Bend*, 277 U.S. 163 (1928), in an effort to establish that the rule of *Osborne* is not "the relic of a bygone constitutional era." U.S. Br. 13. But *Sprout* cannot carry that much freight. In observing that states may impose flat occupation taxes on entities engaged in intrastate commerce, *Sprout* simply cited *Osborne* and similar decisions; its observation therefore appears to have been premised on *Osborne*'s view that taxes on intrastate activities are immune from Commerce Clause scrutiny. See 277 U.S. at 170-171. That view plainly has not survived, however. See Pet. Br. 32-33. Indeed, it is not shared even by the United States, which agrees with us that such taxes may have impermissible effects on interstate commerce. See note 1, *supra*. Dicta in *Sprout* – which, after all, *struck down* a tax that was *not* imposed on intrastate activities – therefore cannot sustain the Michigan tax.[10]

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[9] The United States is wrong in asserting (at Br. 11) that we do not take issue with the validity of the Michigan tax under the rule of *Osborne*. In fact, we explained in our opening brief (at 35) that *Osborne* did not address the question whether a tax on intrastate activities must be apportioned to preclude discrimination against interstate commerce.

[10] The United States reasons that *Sprout*'s citation to *Osborne* shows that the latter case espouses a modern view of the Commerce Clause because the Court in *Sprout* recognized that interstate commerce is not wholly immune from state taxation. U.S. Br. 12. We agree, of course, that "the Court's understanding of the

As noted above, the United States also cites the peddler cases in support of the Michigan tax. U.S. Br. 20-22. See also Resp. Br. 22; Illinois Br. 24. But those decisions, too, have been overtaken by the Court's modern doctrine. In *Wagner*, upon which the United States primarily relies, the Court applied the pre-*Complete Auto* metaphysics, reasoning that entities engaged in interstate commerce are "not subject to the licensing power of the Kentucky municipality" (251 U.S. at 101), but that taxes imposed on local activities are immune from Commerce Clause review because they are "not to be deemed a regulation of or direct burden upon interstate commerce." *Id.* at 102. The other peddler cases cited by the United States used the same wooden analysis. See *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 540 (1969) ("the issue is whether the local activity which is made the nominal subject of the tax is 'such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it'"); *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961); *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 119 (1941) (tax on "purely local business" "imposes no burden upon interstate commerce"). These decisions, which "focus[ed] on * * * formalism [that] merely obscure[d] the question whether the tax produce[d] a

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dormant Commerce Clause has taken some turns" over the years (*Jefferson Lines*, 514 U.S. at 180), and that *Sprout* turned in the right direction when it reasoned that states may impose fairly apportioned taxes on interstate commerce. See generally *id.* at 180-183 (reviewing ups and downs of Commerce Clause doctrine). But *Sprout* plainly relied on the "old formalism" (*id.* at 181) when its dicta approved of flat intrastate fees – a point proven by the metaphysical decisions on which that observation relied. See 277 U.S. at 171 (citing, in addition to *Osborne*, *Postal Tel. Cable Co.* v. *City Council of Charleston*, 153 U.S. 692 (1894); *Kehrer* v. *Stewart*, 197 U.S. 60 (1905); *Watters* v. *Michigan*, 248 U.S. 65 (1918); and *J.E. Raley & Bros.* v. *Richardson*, 264 U.S. 157 (1924)).

forbidden effect" (*Complete Auto Transit*, 430 U.S. at 288), do not provide persuasive guidance here.[11]

C. Concern About The Validity Of Other Flat Taxes Is Not A Basis For Upholding The Michigan Tax

Although Michigan and its *amici* are unable to offer a coherent defense of the Michigan tax, they do argue vigorously that the tax should be upheld because striking it down would lead to the invalidation of many *other* flat state taxes. See U.S. Br. 18-20; Resp. Br. 23-24. On the face of it, this is a peculiar argument; if a tax has impermissible effects, it *should not* stand.[12] Thus, the United States, although recognizing that some fees it identifies confer privileges that are more valuable to local than to interstate businesses (U.S. Br. 18), does not take the time to explain why those fees nevertheless should be thought consistent with the Commerce Clause. But in any event, as often is the case, some rain must

[11] Moreover, notwithstanding the United States' argument to the contrary (at Br. 22), this case is more like the "drummer" than the "peddler" cases. That certainly is true of situations where a Michigan customer contacts an out-of-state dispatcher to send an interstate truck to make an intrastate Michigan haul; in such circumstances, as in *Nippert*, something of value has been sent across state lines at the request of a customer in the taxing state.

[12] Indeed, many of the taxes defended by Illinois (at Br. 14-15) are levies on motor carriers that are identical in their effects to those of the Pennsylvania taxes invalidated in *Scheiner*. And while Illinois (at Br. 14) and Michigan (at Br. 23) note Professor Hellerstein's suggestion that the implications of *Scheiner* could be "rather unsettling" (Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988)), they fail to acknowledge his conclusion that taxes like the ones they cite work "a paradigmatic 'impermissible interference with free trade.'" *Ibid.*

fall on the parade of horribles: this argument regarding other taxes is, in reality, grossly overstated.

First, many of the taxes cited by Michigan and its *amici* plainly would survive Commerce Clause scrutiny. Some will qualify as per-use fees, which approximate the cost of specific services provided to the taxpayer by the state, or the cost of the use of state facilities by the taxpayer. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621-622 & n.12 (1981); *Scheiner*, 483 U.S. at 289-290. Others may be permissible because they approximate the administrative cost to the state of, for example, issuing a license or conducting background investigations precedent to the grant of a permit. Cf. *id.* at 274.[13] Still others will be supportable because apportionment would be wholly impractical or would impose insuperable administrative burdens. See *id.* at 296.

Second, even as to those flat fees that are constitutionally problematic, states generally will be able to satisfy Commerce Clause requirements with a minimum of disruption. Nothing would prevent a state from imposing a flat fee on taxpayers who confine their activities to the taxing jurisdic-

[13] Requiring interstate businesses to obtain licenses or undergo background checks in multiple states could itself impose cumulative burdens on such firms. But whether or not fees pegged to the administrative costs of issuing such licenses are subject to Commerce Clause challenge, such fees are decisively different from the Michigan tax. Scrutinizing businesses that operate in-state is an aspect of the states' unchallenged right to exercise their police powers in furtherance of public safety. When a state requires a business to pay the costs of such screening, it can be said simply to be requiring interstate commerce to pay its own way. See *Complete Auto Transit*, 430 U.S. at 288. That sort of fee is quite different from a levy, like the Michigan tax, that is unrelated in amount to the expense imposed upon the state by the taxpayer. Cf. *Commonwealth Edison*, 453 U.S. at 622 n.12.

tion; the state simply would have to provide a constitutional "out" for those taxpayers who operate in multiple states. For example, such an out could take the form of apportionment of the tax, or of a reciprocity arrangement with other states that protected against cumulative taxation. See *Scheiner*, 483 U.S. at 282-283 (describing constitutional registration and fuel taxes). Because most taxpayers who are subject to such levies likely perform the taxed activities in a single state (see, *e.g.*, U.S. Br. 19 (noting that many taxpayers subject to such levies "will operate out of fixed locations")), the effect of such accommodations on state taxing systems and revenues would be very limited.

Third, even if it is assumed that the logic of our argument would lead to the invalidation of certain state "occupation[]" and related taxes (see U.S. Br. 18), and even if it is further assumed that this consequence is problematic, that would not provide a reason to uphold the particular tax challenged in this case. As the United States recognizes, it is "plausibl[e]" to "distinguish [occupation] assessments [from the Michigan tax] on the ground that flat fees will likely have a greater *practical* impact on an inherently mobile enterprise like trucking than on, *e.g.*, private detectives, many of whom will operate out of fixed locations regardless of a particular State's licensing rules." U.S. Br. 19 (emphasis in original). That observation surely is correct. Trucks are themselves instrumentalities of interstate commerce; cases involving challenges to taxes on motor carriers have come before the Court so often (see, *e.g.*, *Scheiner*, 483 U.S. at 268-269) precisely because such assessments are the paradigm of the sort of levy that may impede interstate commerce. This Court already has determined, in *Scheiner*, that such taxes are likely to affect the uses to which interstate trucks are put, a conclusion that has been echoed by myriad decisions of the state and federal courts. See Pet. Br. 15-16 n. 6, 18 n.9, 24 (citing cases). In this context, if the interest in preserving existing state taxes militates in favor of limiting the principle of *Scheiner*, any such limitations should not apply to save the Michigan tax on motor carriers in this case.[14]

D. Plaintiffs Are Not Obligated To Make An Empirical Showing That A Flat Tax Impedes Interstate Commerce

Michigan and its *amici* contend that the constitutional challenge here must fail because there has been no empirical demonstration of the Michigan tax's effect on interstate commerce. Resp. Br. 19-22; U.S. Br. 15 & n.8, 19-20, 24. In making this argument, they are a little vague on the showing they believe necessary for a challenge to succeed; they do not explain whether the taxpayer must show the difference in effective rate per-mile on local versus interstate businesses, must show that the tax actually affects the business practices of interstate firms, or both. But whatever their theory, the argument lacks merit.

As we argued in our opening brief (at 28-31), this Court has not insisted on any such evidentiary showing when the challenged tax has a structure that necessarily burdens interstate commerce. To be sure, the Court in *Scheiner* noted evidence that the effective tax rate was higher for out-of-state vehicles than for local ones. 483 U.S. at 276. But this empiri-

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[14] Consider the bar fees mentioned by the United States at U.S. Br. 18. It is not at all clear that it would be feasible to apportion such fees. Unlike trucks, which perform their operations in particular, identifiable states, it is much more difficult to say which states have an interest in imposing a tax (and in which proportionate amounts) when, for example, a lawyer in New York writes a brief at the request of a clients in Virginia and California to be filed in an Oregon court. Moreover, in contrast to the regulation of attorneys, the federal interest is at its height when the state rule burdens inherently mobile instrumentalities of interstate commerce like trucks.

cal evidence was not necessary to the Court's decision; the Court found it plain that, "'[i]n the general average of instances,'" flat taxes discriminate against interstate businesses. *Id.* at 291. The Court reached the same conclusion in *Nippert*, where there was no empirical evidence at all regarding differential effective tax rates. See 327 U.S. at 432; Pet. Br. 19-20. The lower courts uniformly have understood this Court's decisions to not require any such proof. See Pet. Br. 30-31 & n.14 (citing cases).

Nor do the Court's holdings require a demonstration that the challenged levy actually succeeded in discouraging interstate commerce. The Court was not moved by the absence of *any* evidence in *Scheiner* that the routes selected by interstate truckers were affected by the flat Pennsylvania taxes. Similarly, in *Nippert* there was no evidence that Richmond's tax actually dissuaded drummers from peddling their wares in the city. The Court nevertheless invalidated the challenged taxes in those cases because "substantial excluding and discriminatory effects" were their "necessary effects." 327 U.S. at 429, 434.[15] The same conclusion applies here.

E. It Would Not Be Impracticable For The State To Impose A Nondiscriminatory Tax

Michigan complains that requiring apportionment of its tax would be impracticable and would pose insuperable administrative burdens on the State. Resp. Br. 9-13. The United States may have a similar point in mind when it asserts that

[15] Although the State (at Br. 22) notes *Nippert*'s observation that the "practical consequences" of a tax must be considered, the Court's point in the quoted passage was that facial neutrality could not save a tax that has the effect of burdening interstate businesses. See 327 U.S. at 431. Without reference to empirical evidence, the Court proceeded to explain that flat taxes "make[] equality of application as between [interstate and intrastate] commerce, generally speaking, impossible." *Id.* at 432.

the Michigan tax "is assessed for the privilege of engaging in purely intrastate transactions and services, not for use of Michigan's highways," and that there accordingly "is no basis in the Commerce Clause for requiring that the fee be mileage-based." U.S. Br. 24. This argument, too, is without merit.

To begin with, the Michigan tax plainly is apportionable. It is levied on the use of Michigan's roads to make intrastate deliveries; at least in part, its proceeds ostensibly are devoted to providing services related to highway safety that vary according to the volume of road use. See Pet. Br. 3 n.2. There is more than one method that could be used to apportion such a tax so that it does not "penalize" interstate commerce. *Scheiner*, 483 U.S. at 284. For example, such a result plainly could be achieved by varying the tax according to miles traveled while making intrastate deliveries, according to the number of intrastate deliveries made, according to the value of intrastate hauls, or by using similar criteria. Such apportionment would eliminate the forbidden effects that the tax otherwise has on interstate commerce.

Michigan nevertheless argues that apportionment is not feasible because a variety of factors would have to be taken into account to apportion the tax fairly and because there is no data collection system currently in place that tracks miles devoted to intrastate hauls. Resp. Br. 11-12. But the Court rejected a very similar argument in *Scheiner*, explaining that "[t]he administrative machinery of revenue collection for highways is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage." 483 U.S. at 297. Truckers typically bill by the mile, and it would be easy enough for Michigan to require motor carriers to keep track of miles traveled while making intrastate hauls or of the number of intrastate hauls completed. Such a system might not capture every variable, but it surely would reflect

at least the relevant "gross variations in cost per unit of highway usage."

The State and its *amici* get no further in arguing that the Michigan tax effectively is already apportioned because MCL § 478.2(3) gives truckers the option of purchasing a temporary, 72-hour permit for $10, in lieu of the $100 permit required by MCL § 478.2(1). Resp. Br. 12; U.S. Br. 18 n.9; NCSL Br. 22. As Michigan and NCSL acknowledge (at Resp. Br. 2 n.3; NCSL Br. 22 n.10), the State makes this option available only when the trucker *already* has paid the full $100 tax to register a truck for intrastate use and wants to temporarily register an *additional* vehicle. The 72-hour permit therefore is of no value at all to carriers that operate only a single truck or that have only a single vehicle in position to take advantage of episodic business opportunities in Michigan – the very carriers that are most likely to be excluded from the intrastate market by the prospect of having to pay the full flat fee. And even apart from that limitation on its availability, the 72-hour permit hardly achieves fair apportionment; as a practical matter, it requires interstate carriers to pay $10 per intrastate haul, while truckers who operate exclusively intrastate likely pay the tax at an effective rate of far less than a dollar per haul. The temporary permit accordingly is no substitute for a fairly apportioned tax.[16]

[16] The point appears to be confirmed by *Scheiner*. Although Pennsylvania offered a similar temporary permit as a substitute for payment of the flat axle tax (see 483 U.S. at 274 ("the axle tax is excused when a trucker pays $25 for a trip permit for a period not exceeding five days")), and also offered an apportioned rebate to trucks that traveled fewer than 2000 miles in Pennsylvania (see *id.*), the Court did not deem those provisions to save the tax.

F. The Michigan Tax Should Not Be Upheld On The Ground That Its Proceeds Are Used For Regulatory Purposes

Michigan (at Br. 24-28) and NCSL (at Br. 5-19) defend the decision below by arguing that "regulatory fees" are not subject to the Commerce Clause rules articulated in *Complete Auto*. The United States disagrees, labeling this distinction between regulatory fees and taxes "flawed." U.S. Br. 9 n.5. (The United States was less polite in its brief at the certiorari stage, describing the distinction as "meaningless" in "substance and effect." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 13-14.) On this, the United States is correct.

In advancing its regulatory fee argument, the State simply quotes from a handful of lower court decisions that are said to have endorsed the tax/fee distinction. Resp. Br. 24-28. But neither those decisions – nor Michigan in its brief – makes any attempt to explain *why* regulatory fees do not have precisely the same effects on interstate commerce as did the taxes invalidated in *Scheiner*. We argued at some length in our opening brief (at 22-28) that taxes on the one hand, and fees used to pay for regulatory activity on the other, should be subject to the same Commerce Clause analysis; the State offers no response at all.

For its part, NCSL seeks to distinguish *Scheiner* by contending that a state's political processes can be relied upon to check the imposition of excessive regulatory fees because such fees – in contrast, according to NCSL, with general revenue taxes – will fall in large part on in-state interests. NCSL Br. 12-15. As NCSL acknowledges (at Br. 14), however, the Court did not advert to this rationale in *Scheiner* (or in *Nippert*). In any event, even if NCSL's unproven empirical assertion is true, it hardly solves the Commerce Clause prob-

lem. Flat taxes (or "regulatory fees") provide advantages to in-state businesses in their competition with out-of-state and interstate firms; the more business conducted in the taxing state, the greater the competitive advantage provided. There is no reason to believe that the majority of in-state firms affected by such a fee, and provided with these competitive advantages, would object to the fee's structure or amount.

NCSL also contends that this Court has "no reason for intervening" here because the Michigan tax likely will be passed on to Michigan consumers. NCSL Br. 16-18. But this argument cannot support a tax that has impermissible effects on competition across state lines. Under NCSL's rationale, *any* discriminatory tax on out-of-state businesses could be justified on the theory that the affected companies might pass the tax through to the ultimate consumer. In fact, this argument highlights the pernicious effects of the Michigan tax: the competitive disadvantage imposed by the tax will be greatest on interstate firms that pass the tax on to their customers.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

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